Circuit Court for Anne Arundel County
Case No. C-02-FM-19-002705

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 1338

September Term, 2020

CATHERINE LOHR

v.

ERIC SHEA

Nazarian,
Beachley,
Wells,

JJ.

Opinion by Beachley, J.

Filed: September 21, 2021

On November 30, 2020, the Circuit Court for Anne Arundel County awarded shared physical and joint legal custody of W.S. to his parents, appellant Catherine Lohr ("Mother") and appellee Eric Shea ("Father"). Mother timely appealed and presents the following questions, which we have slightly rephrased:

1. Did the trial court err or abuse its discretion in awarding the parties shared physical and joint legal custody?

2. Did the trial court err by denying Mother the right to extend discovery and name her expert witness?

3. Did the trial court err in its child support determination?

For the following reasons, we answer these questions in the negative and affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Mother and Father met in 2017, shortly after Father was divorced and while Mother was going through a divorce. After dating for approximately a year, they were engaged and decided to have a child together.[1] When Mother was six months pregnant, Father moved into Mother's house. The parties' child, W.S., was born in November 2018. On July 4, 2019, Father abruptly moved out of the house, and within two weeks both parties had filed complaints for custody of W.S.

A *pendente lite* hearing was held on August 15, 2019, resulting in an order that granted Mother primary physical custody and delineated a visitation access schedule for Father. The *pendente lite* order required that Father's visitation be supervised until he "complete[d] [a] State-certified substance abuse evaluation" verifying that he had no

[1] Mother has three children from her prior relationship.

substance abuse issue. In a separate order, the court required both parties to participate in a psychological evaluation to be administered by Dr. Gina Santoro.

A four-day merits hearing was held from September 29, 2020, to October 2, 2020. Eleven witnesses testified, including both parties and Dr. Santoro, as the court-appointed mental health professional. The court issued an order and memorandum opinion on November 30, 2020. The order provided for shared physical custody of W.S., with a schedule that gradually increased his time with Father until he begins kindergarten. The order also provided for joint legal custody, with Father having tie-breaking decision-making authority.

We shall provide additional facts as necessary to resolve the issues raised on appeal.

DISCUSSION

I. *Physical and Legal Custody*

When reviewing custody decisions, "the trial court's decision governs, unless the factual findings made by the [trial] court are clearly erroneous or there is a clear showing of an abuse of discretion." *J.A.B. v. J.E.D.B.*, 250 Md. App. 234, 262 (2021) (alteration in original) (quoting *Gordon v. Gordon*, 174 Md. App. 583, 637–38 (2007)). A court must consider numerous factors when making a custody decision, including:

> (1) fitness of the parents; (2) character and reputation of the parties; (3) desire of the natural parents and agreements between the parties; (4) potentiality of maintaining natural family relations; (5) preference of the child; (6) material opportunities affecting the future life of the child; (7) age, health and sex of the child; (8) residences of parents and opportunity for visitation; (9) length of separation from the natural parents; and (10) prior voluntary abandonment or surrender.

Montgomery Cty. Dep't of Soc. Servs. v. Sanders, 38 Md. App. 406, 420 (1977) (citations omitted). Additionally, in determining the parents' ability to share custody, the court must consider:

> (1) capacity of the parents to communicate and to reach shared decisions affecting the child's welfare;
>
> (2) willingness of the parents to share custody;
>
> (3) fitness of the parents;
>
> (4) relationship established between the child and each parent;
>
> (5) preference of the child;
>
> (6) potential disruption of the child's social and school life;
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> (7) geographic proximity of parental homes;
>
> (8) demands of parental employment;
>
> (9) age and number of children;
>
> (10) sincerity of the parents' request;
>
> (11) financial status of the parents;
>
> (12) impact on state or federal assistance; and
>
> (13) benefit to the parents.

Taylor v. Taylor, 306 Md. 290, 304–11 (1986). The guiding principle to which all of these factors point is the best interests of the child. *Jose v. Jose*, 237 Md. App. 588, 600 (2018) (citing *Wagner v. Wagner*, 109 Md. App. 1, 38 (1996)).

In its lengthy written opinion granting the parties shared physical and joint legal custody of W.S., the court considered all of the *Taylor*/*Sanders* factors. Mother does not assert that the court used the wrong law. Rather, her principal appellate argument focuses

on eleven mostly fact-based alleged errors embedded within the court's opinion. To provide proper context to Mother's arguments, we shall first review salient aspects of the court's opinion, and then proceed to address each of the alleged errors. We shall ultimately conclude that the court did not abuse its discretion in its custody determination.

At the outset of its opinion, the court articulated a basic conclusion that was omnipresent throughout its opinion:

> The [c]ourt finds that the parties had a very passionate relationship and one that was either, to quote [Father], "awesome or hellish." Both parties are very intense and somewhat rigid. Throughout the relationship, [Father] tended to lash out and say horrible things to [Mother]. These outbursts and horrendous insults continued after the relationship ended. [Mother], on the other hand, believes her opinions are always right and you are either on her team or you are the enemy.

The court then proceeded to consider each of the *Sanders* factors regarding physical custody. The court first addressed the "fitness of the parents," concluding that while both parties "want what is best for [W.S.]," they have difficulty interacting. Despite Mother's insistence that Father has an alcohol problem, the court concluded that he did not, basing its determination on evaluations from a certified alcohol treatment provider and Dr. Santoro. The court "grudgingly" concurred with Dr. Santoro that Father "does not have an anger management problem," but nevertheless noted that some of his actions were "absolutely reprehensible." As to Mother, the court found that she "is extremely hard to get along with and if you are not with her, you are against her." Moreover, the court found that Mother "has done everything in her power to minimize [Father] and his family's access to [W.S.]." Despite these concerns, the court found that both were fit parents.

Turning to the "character and reputation of the parties," the court had concerns that each parent disparaged the other and his or her family. The court further noted that Mother's "repeated denial of access to [Father] does not bode well for her character." That same theme appeared in the court's analysis of the "desire of the natural parents and agreements between the parties," as the court found that Mother sought to "unreasonably limit" Father's access to his son.[2]

Finding that W.S. has a "close bond" with Father and his parents and that W.S. "is an integral part of [Mother's] family," the court concluded that "[W.S.] needs to spend large blocks of time with [Mother] and her three older children as well as [Father] and his parents."

After considering the "material opportunities affecting the future life of the child" and the "age, health and sex of the child," the court considered the "suitability of the residence of the parents and whether the noncustodial parent will have adequate opportunity for visitation." That the parties lived nine miles apart persuaded the court that

[2] In this section of its opinion, the court stated: "As far as any agreement between the parties, there was very little collaborative interaction between the parties prior to the trial and the [c]ourt finds the *Pendente Lite* agreement made by [Father] was done solely to see [W.S.] and was not what he actually desired." In her brief, Mother asserts that, because the *pendente lite* order arose from a contested hearing, "[o]ne of the most glaring mistakes" was the court's suggestion that there was a *pendente lite* agreement. Although Mother is correct that there was no *pendente lite* agreement, the court's statement was otherwise correct—there was "very little collaborative interaction" between the parties prior to trial and the *pendente lite* order fell short of what Father desired. In light of the court's extensive analysis of the factors relevant to physical and legal custody, we fail to see how the court's erroneous reference to a *pendente lite* agreement could constitute reversible error.

both parents "should be able to see [W.S.] as much as possible." Because the court was concerned that Mother, who lives adjacent to the water, "does not take water safety seriously," it required both parties to ensure that W.S. wear a life vest "when he is less than 50 feet from the water or actually in or on the water."

As to the "length of separation from the natural parent" factor, the court noted that Father and W.S. were "separated, for some time, because of the actions of [Mother]." The court further opined that "the issues surrounding this case all revolve around [Father] attempting to get his rightful access to his son and [Mother's] overt actions in denying him that access."

Finally, the court found that while "[n]either party voluntarily abandoned [W.S.] or surrendered custody," Mother "made a conscious effort to deny [Father] access to [W.S.]."

Having considered all of the *Sanders* factors, the court concluded that an award of shared physical custody was in W.S.'s best interests.

The court made similar findings in its legal custody analysis, where the court addressed each of the *Taylor* factors. Under "capacity of the parents to communicate and reach shared decisions affecting the child's welfare," the court reiterated that Mother "believes you are on her team or you are the enemy" and, accordingly, found that she did not intend to cooperate with Father to co-parent W.S. Moreover, the court was "not confident that [Mother] can change her ways and communicate with [Father] in a positive way for the benefit of [W.S.]." The court further found that, while Father made an effort to co-parent, Mother is not willing "in any way" to share custody. Relatedly, under the

"psychological and physical fitness" factor, the court noted that Dr. Santoro found Father psychologically fit to have legal custody, but Dr. Santoro was "less optimistic" as to Mother's psychological fitness. The court reiterated that Mother "may be unwilling or unable to co-parent in an effective way with another parent."

After considering all of the *Taylor* factors, the court concluded that joint legal custody was in W.S.'s best interest, with Father having tie-breaking decision-making authority. Against this backdrop of the court's findings and conclusions, we shall now turn our attention to Mother's asserted errors in the court's decision to award shared physical and joint legal custody.[3]

A. THE COURT DID NOT IMPROPERLY RELY ON DR. SANTORO

Mother complains about the court's "over-reliance" on Dr. Santoro's report and testimony. Mother notes that Dr. Santoro had last interviewed the parties over a year before the merits hearing and had not seen any of the inappropriate texts Father sent to Mother. Mother further argues that the court discussed Dr. Santoro's "findings regarding custody, [though] she was not charged with any custody evaluations and made no recommendations about custody." (Emphasis removed).

Dr. Santoro was the only expert witness to testify at trial. The court mentioned Dr. Santoro's report and testimony a total of six times in its fifteen page custody analysis:

- "The [c]ourt will note that the alcohol evaluation and Dr. Santoro's report found that [Father] does not have a drinking problem. Additionally, the

[3] As previously noted, Mother alleged eleven separate errors. We addressed her first alleged error in note 2, *supra*. Although we shall address Mother's other ten claims, we shall not do so in the same order set forth in Mother's brief.

psychological evaluation, in general, was more favorable to [Father] than to [Mother]."

- "[A] psychological evaluation was conducted by Dr. Gina Santoro, who testified at trial, and she also found that [Father] did not have an alcohol problem."

- "Dr. Santoro found, after a full battery of tests and talking to [Father's] therapist, that [Father] does not have an anger management problem. The [c]ourt will grudgingly concur with this assessment but would expect [Father] to continue in therapy and to know that his actions were utterly unacceptable."

- "With regard to [Mother], the [c]ourt heard credible evidence that [Mother] is extremely hard to get along with and if you are not with her, you are against her. This pattern occurred with her ex-husband and it clearly started to occur once [Father] left [Mother]. It is noteworthy that prior to the separation on July 4, 2019, [Mother] considered both [Father] and his parents fit enough to not only be with [W.S.], but care for her three older children. Then, immediately after [Father] rejected her, he and his family became the nemesis of 'team [Mother].' Said observations are confirmed by Dr. Santoro's psychological evaluation."

- "[A]s set forth in the psychological evaluation and having reviewed all of the evidence, the [c]ourt is not confident [Mother] can change her ways and communicate with [Father] in a positive way for the benefit of [W.S.]"

- "Regarding [Father]'s psychological fitness, while [Father] has issues with disparaging [Mother] and her family as well as flashes of frustration and/or anger, Dr. Santoro found him to be psychologically fit to have custody of [W.S.]. However, regarding [Mother]'s psychological fitness, Dr. Santoro was less optimistic."

We summarily reject Mother's assertion that the court disproportionately relied on Dr. Santoro's testimony and report. All of the court's findings set forth above are amply supported by the record, and it is within the trial court's province to determine the weight to be given to the evidence.

Additionally, while Dr. Santoro did not make any custody recommendations, she did provide testimony related to the parties' fitness. As to Father, Dr. Santoro concluded that the "assessment indicated no presence of emotional or personality problems that could interfere with his parental role or daily functioning." Dr. Santoro testified that Mother's evaluation indicated overall "that she was experiencing habitual, maladaptive ways of relating, behaving, thinking and feeling, lacking insight about herself and others." Dr. Santoro testified how these tendencies might affect Mother's parenting: "The testing showed that [Mother] is prone to angry outbursts and has difficulty controlling her emotions in that capacity. . . . I can't say I don't have concerns, but I certainly did not assess for concerns, and there was no report to me from [Father] that he had concerns about [W.S.]'s physical safety." However, Dr. Santoro also indicated that Mother had a history of "bad-mouthing" both her ex-husband and Father around the children, and described the psychological harm such actions can cause to a child's self-esteem and "undermin[ing] or erod[ing] relationships with at least one parent." The court's analysis of the parties' psychological fitness to parent is clearly supported by this evidence.

B. THE COURT DID ACKNOWLEDGE THAT MOTHER HAD BEEN THE CHILD'S PRIMARY CARETAKER

Mother baldly asserts that "[i]n its twenty-two page Memorandum, the lower [c]ourt never acknowledges that [Mother] was the minor child's primary caretaker his entire life." However, in determining that shared physical custody was in W.S.'s best interest, the court recognized that, because Mother had "never been separated from [W.S.] for any significant period of time," a period of transition to shared physical custody was required, stating:

"Given the reality of [W.S.] spending the majority of his time with [Mother], said shared custody will be tiered in until [W.S.] goes to kindergarten." Although the court never expressly referred to Mother as W.S.'s "primary caretaker," the court's comments make it clear to us that the court fully understood that Mother had fulfilled that role.[4]

C. THE COURT WAS NOT CLEARLY ERRONEOUS WHEN IT CONCLUDED THAT FATHER MADE A GOOD FAITH EFFORT TO COMMUNICATE, BUT THAT MOTHER DID NOT

Mother argues that, because of Father's frequent inappropriate communications with her, the court erred in finding that Father "made a good faith effort to co-parent." She also argues that the court's finding that she "made no such effort" to co-parent evinced a "double-standard" regarding communication between the parties.

The court provided the following explanation for its findings:

> It is clear from the evidence that once the parties separated, [Mother] felt that [Father] was an adversary and was not going to cooperate with him to raise, or even see, [W.S.]. For example, [Father] would ask about bedtimes, feeding habits and safety issues regarding [W.S.] and [Mother] would not respond to him. Even though there were times when [Father], in a totally inappropriate manner, lashed out and said horrible things about [Mother] and her family, [Father] made a conscientious effort to communicate with [Mother] in an attempt to raise [W.S.].
>
> The Court finds that [Father] made a good faith effort to co-parent with [Mother]. Unfortunately, the Court also finds that [Mother] made no such effort. Also, as set forth in the psychological evaluation and having reviewed all of the evidence, the Court is not confident [Mother] can change her ways and communicate with [Father] in a positive way for the benefit of [W.S.].

[4] In this section of her brief, Mother asserts that the court awarded Father "approximately fifty percent (50%) of the minor child's waking hours. No transition. Simply starting now." We note that the court's judgment contains progressively increased custodial time with Father until the child starts kindergarten.

Suffice it to say that the voluminous text messages in evidence amply supported the court's conclusion that Mother would have difficulty communicating effectively with Father. As to Father, the court acknowledged that his communications were sometimes inappropriate, but there was also evidence that Father did attempt to communicate with Mother without success. For example, when Father was off work for long stretches, he would frequently request "extra time" with W.S. or offer to watch W.S. any time Mother was busy with her other children's activities. Mother usually did not respond to Father. On the occasions when Mother did respond to these requests, her answers were invariably short phrases such as "Noted" or "No thank you." When Father asked for information about W.S.'s bedtime routine after noting that W.S. would fall asleep during morning visits, Mother responded: "My answer is if a child needs to sleep you let them sleep." When Father again requested information about the sleep schedule, Mother replied: "Please consider backing off and leaving me alone." We perceive no error in the court's findings concerning the parties' ability to communicate.

D. THE COURT WAS NOT CLEARLY ERRONEOUS IN STATING THAT FATHER WAS "SEPARATED, FOR SOME TIME" FROM THE CHILD

In analyzing the "Length of separation from the natural parent who is seeking custody" factor, the court stated:

> [Mother] has never been separated from [W.S.] for any significant period of time. [Father] on the other hand was separated, for some time, because of the actions of [Mother]. It should be noted that the issues surrounding this case all revolve around [Father] attempting to get his rightful access to his son and [Mother]'s overt actions in denying him that access. The [c]ourt finds that [Father] was an active custodial parent while

> the parties were together and attempted to do so [sic] once the parties separated.

Mother argues that Father was never "separated" from W.S. because he "had not gone more than a few days at a time without seeing the minor child." Resolution of this issue involves discerning what the court meant when it used the word "separated" in this context. So far as we can discern from the record, Mother is correct that Father has never "gone more than a few days at a time without seeing" W.S. However, the record also clearly shows a pattern of Mother failing to coordinate visitation around Father's work schedule, as required by the *pendente lite* order. On multiple occasions, Father was required to work during his assigned visitation time, but Mother was uncooperative in scheduling make-up time. A reasonable interpretation of the court's finding that Father "was separated, for some time, *because* of the actions of [Mother]" is that Mother directly impeded Father's ability to see W.S. We see no clear error in that finding.

E. The Evidence Supported the Court's Conclusion That Some of Father's Inappropriate Actions Were As A Result of Mother's Denial of Visitation

In its opinion, the court mentioned in multiple places that Father frequently disparaged Mother and her family by using "utterly inappropriate" language, and had "flashes of frustration and/or anger." It concluded that these outbursts were "for the most part, in response to [Mother]'s unacceptable and unreasonable denial of access."

Mother argues that "[Father]'s outbursts could not have been caused by [Mother] 'unreasonably' withholding the minor child because they pre-dated the problems." She argues that the court used a double standard by "look[ing] past" Father's inappropriate

communications and not allowing Mother "the same leeway." Mother lists several specific statements she alleges that Father made, some of which he acknowledged.[5] She additionally alleges that her withholding of visitation was not "unreasonable" because she believed that Father abused alcohol, that he had issues with anger, and that he acted impulsively.

That Father had outbursts prior to the parties' separation does not render the court's finding clearly erroneous. The vast majority of Father's outbursts after the parties' separation related to Mother's denial of visitation access or Mother's inflexible and uncooperative responses regarding access to the child. Examples of such actions include: dictating the location for pick-up and drop-off without any discussion with Father, failing to answer Father's questions about the child's routines or allergies, and consistently refusing to provide make-up visitation time when convenient to Father. Additionally, when Mother responded at all to Father's requests for additional time with W.S., such as on Christmas Eve, Father's Day, or when he had multiple days off work, her responses consisted of nothing more than short phrases: "No thank you," "Noted," and "We are following the order at this time." The court further found that Father did not have issues

[5] We note that Mother did not provide any record citations to some of the most specific and egregious statements she attributes to Father. Our search of the voluminous record has failed to unearth any evidence of these statements. We "cannot be expected to delve through the record to unearth factual support favorable to [the] appellant," a principle that is particularly poignant in this case since we ordered Mother to file an amended brief requiring her to identify extract references in support of factual statements. *Boston Sci. Corp. v. Mirowski Family Ventures, LLC*, 227 Md. App. 177, 194 (2016) (alteration in original) (quoting *Rollins v. Capital Plaza Assocs.*, L.P., 181 Md. App. 188, 201 (2008)).

with alcohol and that he had never even been accused of violence toward the child or Mother. Thus, the evidence fully supports the court's finding that Father's outbursts were "for the most part" in response to Mother's inflexibility and unreasonable denial of visitation.

F. THE COURT PROPERLY EXPRESSED CONCERNS ABOUT THE CHILD'S SAFETY

Mother argues that the court's expressed concerns about child safety at her home "ignore reality" because Mother had raised three other children at that same home without incident. The court stated in its memorandum opinion:

> The [c]ourt is most concerned about [Mother's] laissez faire attitude towards the safety of [W.S.]. For example, the [c]ourt heard testimony about a fence that may or may not be in working order. The Court also heard testimony, and evidence was submitted, that [Mother] does not take water safety seriously. The [c]ourt agrees. Until such time as both parties agree that [W.S.] is old enough not to wear a life vest on or about the water, the [c]ourt will require that [W.S.] wear a life vest when he is less than 50 feet from the water or actually in or on the water.

In her brief, Mother asserts that "[t]he so-called conflicting testimony about the fence was [Father's] word against everyone else who has been to the house who testified." The fence in question is one separating Mother's backyard from the water. The testimony did not concern the condition of the fence itself, but rather the gate in the fence. Father testified that the gate needed to be lifted up to open and close it and expressed concern that one of Mother's older children would neglect to close the gate, allowing W.S. access to the water. Both Mother and her sister testified that the gate is in working order and does not stick. We note that the court merely stated that the fence "may or may not be in working order."

To the extent that the court believed Father's testimony on this subject, it was clearly entitled to do so.

As previously noted, the court expressed concerns, based on the evidence, that Mother "does not take water safety seriously." The following colloquy took place during Mother's testimony:

> THE COURT: Now, you said you have no fear of [W.S.] being near the water on the other side of the fence. You have no fear at all?
>
> [MOTHER]: Without me or with me?
>
> THE COURT: I mean he could be five feet away, he runs down the pier and gets in the water and you cannot find him, you have no fear at all that that might happen?
>
> [MOTHER]: I've lived in that house so long, the water is not -- the water is not murky. Most of the time it's shallow water and you can see the bottom. [W.S.] is actually very careful on the pier. He's actually insanely careful because he wants to do what the other kids -- he's very careful. He's a very careful kid in general. I don't know how to -- like he knows not to even like lean over and try to put the net in.
>
> If it is, he likes [sic] lays on his belly and tries to scoop the fish and I've never had a -- I feel like I know what's going on in my house . . . .

This testimony supports the court's conclusion that Mother has a "laissez-faire attitude" concerning the safety of W.S., who was then not yet two years old, near the water.

Moreover, the court's determination on this issue was neutral: "Until such time as both parties agree that [W.S.] is old enough not to wear a life vest on or about the water, the [c]ourt will require that [W.S.] wear a life vest when he is less than 50 feet from the water or actually in or on the water." That condition applies equally to Mother and Father.

We utterly fail to see how the court's determination on this issue could constitute reversible error.

G. THE COURT'S REFERENCE TO "POLICE INVOLVEMENT" IS SUPPORTED BY THE RECORD

Mother argues that the court "expressed its concerns over police involvement," but focused only on times when Mother called the police and "ignored the uncontroverted testimony that [Father] also involved the police." Mother provided citations to the record indicating only two times in which Father initiated police involvement in the parties' custody disputes. The first occurred when Father called the police to the location where the parties were exchanging the child because Mother was refusing to allow him to take the child during his visitation time. The second was during an exchange taking place inside a police station in May 2020, where Father notified a nearby officer that Mother had entered the building without a face mask. That instance, therefore, did not involve a "call" to police.[6]

The court's only mention of police involvement in its memorandum opinion is as follows: "It concerns the [c]ourt . . . that [Mother] repeatedly called the police and involved all her children unnecessarily in those episodes." The two instances in which Mother called

[6] In discussing times when Father initiated police involvement, Mother uses the plural noun "calls." Only one of the incidents she cited to involved a "call" to police. Our search of the record unveiled one additional instance of Father initiating police involvement, which also did not involve a "call." In that instance, Father complained to a nearby officer that Mother was recording him during their exchange of the child inside a police station. Notably, Mother made the decision that exchanges would take place inside the police station.

police both involved her calling the police to Father's home after the exchange had already taken place. The parties and witnesses disagreed about some details of these events, but most of the testimony was consistent. The first instance took place when Father's visitation was still being supervised. One of Mother's older children suggested during an exchange that, after Father returned W.S., Mother would "go someplace where you can't find us." In response, Father indicated to Mother that he may not return W.S. Father's mother, who was the visitation supervisor, reassured Mother that they would return W.S., but Mother nonetheless called the police after Father and his mother left with W.S. Police officers and Mother arrived at Father's home while Father and his mother were taking W.S. for a walk. When they learned the police had arrived, they walked back to Father's house. Mother removed W.S. from the stroller and placed him in her vehicle with one of her older children. Mother then left with W.S. before Father's scheduled visitation time was concluded.

The second instance took place on July 11, 2020. Father had W.S. for an overnight visit, and noticed during the night that W.S. had developed a fever. He texted Mother about the fever at "around 1:00 or 2:00 in the morning," and Mother returned his text asking for more details. Father testified that he measured W.S.'s temperature using a forehead thermometer, but after becoming impatient with Mother's repeated questions, made a "wisecrack" stating that he held a rectal thermometer against W.S.'s forehead to take his temperature. Mother took that comment literally. In response, she called the police to Father's house at 4:00 a.m., awakened her other children, and brought them with her to Father's house. Mother insisted that Father take W.S.'s temperature again in the presence

of her or the police officer, which Father eventually did, and Mother left. Based on this evidence, we see no clear error in the court's reference to Mother repeatedly calling the police, and its failure to mention Father's single call to police does not evince any unfair bias against Mother.

H. THE COURT'S REFERENCE TO MOTHER DENYING FATHER VISITATION ON THANKSGIVING, CHRISTMAS, AND FATHER'S DAY DOES NOT EQUATE TO CLEAR ERROR WARRANTING REVERSAL

Within the court's lengthy discussion of the parties' fitness, the court stated:

> From the date of the parties' separation up to and including during the trial, [Mother] has done everything in her power to minimize [Father] and his family's access to [W.S.]. This includes denying [Father] access to [W.S.] at Thanksgiving and Christmas in 2019, and on Father's Day in 2020.

Mother presents the following explanation to support her contention that the court "misunderstood" the visitation on these holidays:

> Thanksgiving, 2019 was addressed in the testimony. This was still during the time [Father's] visitation was to be supervised and he was on call that weekend. [Father] could not secure a supervisor. [Mother] offered to meet in a public place and also invited him to her sister's home. It was [Father] who chose to forego this option. . . .
>
> By Christmas, 2019, the condition to remove supervision had been met and [Father] had the minor child for eight (8) hours—the vast majority of the waking hours of a then thirteen (13) month old baby. . . .
>
> For Father's Day, the testimony was that [Father] had the minor child the day before (Saturday of the weekend). [Mother] had offered to switch the days, but [Father] wanted extra time. That was also not refuted. She followed the *Pendente Lite* Court order[.]

The record reveals that by Thanksgiving, Father had already provided an alcohol assessment that arguably met the requirements of the *pendente lite* order, and thus may not have required visitation supervision. Father filed a contempt petition as early as September

2019, which included allegations that Mother had denied him unsupervised visitation. In any event, Father apparently was not able to see his son on Thanksgiving in 2019.

It is uncontroverted that on Christmas *Day*, 2019, Father was provided with the full amount of visitation with W.S. that was expressly provided for in the *pendente lite* order. However, the record reveals that Father had requested some additional visitation with W.S. on Christmas *Eve*, which Mother denied. Christmas Eve fell on a Tuesday in 2019, which was not one of Father's regular visitation days.

Similarly, Father's Day, a perennially Sunday holiday, was not one of Father's regular visitation days, and the *pendente lite* order did not expressly provide Father any extra visitation time on Father's Day. The record citation Mother provides in her appellate brief does not support her assertion that she had offered to switch days with Father that weekend, and our search of the seven-volume record extract did not uncover any support for this assertion.

To be sure, a strict reading of the *pendente lite* order would substantiate that Mother was to have custody of W.S. for the entirety of Christmas Eve and Father's Day. Nevertheless, the *pendente lite* order provided that Mother was to provide "liberal and reasonable rights of access to [Father]." That provision could reasonably be interpreted to permit Father to see his child on Father's Day even if not expressly provided for in the extant court order. But the more significant point is one which the court revisited frequently in its opinion—that Mother's consistent denial of visitation outside the confines of the *pendente lite* order represented a pattern of intransigence in addressing child access

matters. We construe the court's observation that Mother did "everything in her power to minimize" Father's access to mean that it believed Mother did not cooperate to provide Father with reasonable, additional access during those holidays. Although it is not clear that the court misconstrued Father's actual Thanksgiving, Christmas, and Father's Day access, any such misinterpretation is *de minimis* when viewed in the context of the court's entire opinion.

I. THE COURT PROPERLY CONSIDERED THE DEMANDS OF PARENTAL EMPLOYMENT

Mother argues that the court did not adequately address the differences between Mother's and Father's work schedules. Father works as a Chesapeake Bay pilot, and either works or is on-call for over half the year. During this time, he may be called in to work at any time of day and must report to work 90 minutes after he is called. Mother works part-time from home.

The court's only comment about the parties' employment as it relates to custody came during its discussion of the legal custody factors:

> The evidence shows that [Mother] works part-time from home and therefore the demands of her employment should not affect legal custody. With regard to [Father], the testimony of [Father]'s mother and his friend Eric Pickett leads the [c]ourt to believe that [Father]'s employment, combined with the active involvement of his parents, should not negatively affect his ability to have legal custody.

The court did not discuss Father's work schedule with regard to physical custody. However, the court noted that Father's parents were actively involved with W.S., and the paternal grandmother had recently retired and expressed her commitment to assist with

W.S.'s care when Father is called into work. The court further noted that W.S. has "a close bond" with Father's parents, and found that, "in order to maintain natural family relations, [W.S.] needs to spend large blocks of time with . . . [Father] and his parents." Furthermore, Father testified that the times during which he might be called to work are somewhat easy to predict, which would allow him an extra day or two to arrange for appropriate care of W.S. *See Schaefer v. Cusack*, 124 Md. App. 288, 298–99 (1998) (holding that the trial court did not abuse its discretion by awarding Father six weeks of summer visitation, despite Father's "extensive work and travel schedule," which involved working "late nights, weekends, and travel[ing] out of the country on a monthly basis," noting that, if Father "has visitation it will be up to him to work out just how he handles the matter"). We note that Mother does not suggest any more practical alternative to the court-ordered schedule that would accommodate Father's on-call schedule and simultaneously provide W.S. with the regular access required for a two-year-old to maintain bonds with both parents. In the end, we are confident that the court fully understood the parties' work schedules, but determined that it was in W.S.'s best interests to clearly delineate the access schedule in order to avoid further conflict between the parties. We therefore perceive no abuse of discretion.

J. THE COURT DID NOT ERR IN PROMULGATING A TRANSITIONAL SHARED PHYSICAL CUSTODY PLAN

In a separate argument in her brief, Mother asserts that, because the court's custody determination includes an increasing access schedule for Father culminating with W.S. beginning kindergarten, the court improperly "attempt[ed] to project four (4) years into the

future of what will be in the minor child's best interests." Mother's entire argument on this issue spans only a single short paragraph in which she fails to cite any supporting law.

The order provides Father with physical custody of W.S. every other weekend (Friday at 9 a.m. through Monday at 5 p.m.) and Tuesday at 9 a.m. through Wednesday at 5 p.m. beginning immediately. This schedule then shifts after W.S. starts kindergarten to: every other weekend (Friday after school to Monday morning when the child returns to school) and Monday afternoon to Wednesday morning, when the child goes to school. In summary, aside from the weekends, which are evenly split for the entire duration of the order,[7] the child will spend slightly less than two-thirds of his time with Mother until he begins kindergarten, and approximately half his time with Mother thereafter.[8]

In *Schaefer*, *supra*, the order granted mother physical custody of a toddler until after he completed 5th grade—some eight years later—at which point custody would switch to his father. *Id.* at 291–92. We held that that was an abuse of discretion because many intervening factors related to the child's best interest could materially change over the course of eight years. 124 Md. App. at 297–98.

[7] Aside from occasions when the Monday after Mother's weekend with W.S. is a federal holiday, the court failed to clarify which party is to have custody of W.S. during school hours on the Mondays, Wednesdays, and Fridays when his school may be closed. It is our hope that, by the time W.S. enters kindergarten, the parties will have learned to communicate amicably with one another to come to a solution.

[8] For summer visitation, the court provided that: in 2021, each parent would have three nonconsecutive weeks with W.S.; in 2022, each parent would have four nonconsecutive weeks with W.S.; and "in 2023 [and thereafter], each party will get two consecutive weeks and the other weeks shall alternate."

In this case, the future change in custody is minimal—it simply adjusts the original shared physical custody award slightly to create a gradual shift toward 50/50 physical custody. In that respect, there is no sudden change, as in *Schaefer*. *See also Sullivan v. Auslaender*, 12 Md. App. 1, 17–18 (1971) (disapproving a custody arrangement which would "place [the children] with the father in Israel for three years, then uproot them again and return them to the mother in the United States for three years, leaving their future at the end of the six year period to be later determined"). In fact, the purpose of the transition to 50/50 custody is to *avoid* the jarring effect that Mother expressed concern about elsewhere in her brief.

In summary, the court properly considered all of the *Sanders/Taylor* factors, and the record clearly supports the court's determination that a shared physical and joint custody award is in W.S.'s best interests. We therefore affirm the court's custody determination.

II. *Expert Witness*

Mother argues that the court erred in denying her motion to extend time to name experts, and subsequently not allowing her counselor, Dr. Scott Smith, to testify as an expert, without having first considered the best interests of the child, as required by *A.A. v. Ab.D.*, 246 Md. App. 418, 448 (2020). We disagree.

To analyze this issue, we must first provide a timeline of events. Shortly after the *pendente lite* hearing in August 2019, the court ordered a psychological evaluation for both parties to be completed by Dr. Gina Santoro. Dr. Santoro completed the evaluations in October 2019, but did not immediately prepare a written report.

The scheduling order required the parties to name any expert witnesses by December 13, 2019. On December 2, 2019, Mother named three expert witnesses—Dr. Santoro, Dr. Tracy Riggins, and Dr. John McClanahan. On December 5, 2019, Mother filed two motions, one to extend the discovery deadline and one to extend the time for naming experts. Both motions were premised on Mother not having received Dr. Santoro's psychological evaluation report. She therefore sought additional time to have the report reviewed by an expert.

On December 10, 2019, Mother received a copy of the report, and the next day Father filed oppositions to the motions. Father argued that the motions were moot because Mother had already named experts and had received a copy of the report. On December 17, 2019, the court summarily denied Mother's motions.

Mother began seeing Dr. Smith for counseling in January 2020. At no point did Mother attempt to name Dr. Smith as an expert witness. In fact, Father was not even informed of the existence of Dr. Smith until June 30, 2020. Concerning that disclosure, Father's counsel stated:

> [I]t was a brief notation in [Mother's] supplement[al] answers to interrogatories that I got June 30th as a result . . . of a motion to compel I had to file to get that information to begin with. But that is it. And it was very vague. His full name wasn't even listed in the supplemental answer. His address wasn't listed. No credentials. Nothing like that.

At the merits hearing, Mother's counsel made, at best, a vague attempt to call Dr. Smith as an expert witness. After Father's counsel objected to Dr. Smith being called as an expert, Mother's counsel stated, "He is here primarily as a fact witness." Later in his

colloquy with the court, Mother's counsel reiterated that "[w]ell, he is here as a fact witness who is going to testify that she followed -- did what she was supposed to do pursuant to the psychological report." Most significant to our resolution of this issue is that Mother's counsel did not make a proffer concerning the substance or importance of Dr. Smith's testimony as an expert and failed to articulate how Dr. Smith's expert testimony would differ from his testimony as a fact witness. We have consistently held that "[w]here the evidence is excluded, a proffer of substance and relevance must be made in order to preserve the issue for appeal." *S. Kaywood Cmty. Ass'n v. Long*, 208 Md. App. 135, 164 (2012) (quoting *Sutton v. State*, 139 Md. App. 412, 452 (2001)); *see also Univ. of Md. Med. Sys. Corp. v. Waldt*, 411 Md. 207, 236 (2009) (insufficient proffer of expert testimony related to informed consent claim precluded appellate review).

The lack of a proffer in this case is particularly significant because the court recognized the importance of Mother's rights in a custody case, stating:

> I am not going to let him be an expert. But I am going to let him testify. We do have -- she has -- [Mother] has certain Constitutional rights. I reviewed the file. She had time to note an expert. Even had she not noted an expert and had in February, March, April and May had provided documentation from him, I may have -- I am not sure I would have ever let the expert in but I may have let more in. I am going to let him testify. I don't know to what extent -- what weight I am going to give it but from a standpoint, I will sustain your objection as to him being an expert and I will overrule your -- I will overrule as to him being a fact witness.

Consistent with its ruling, the court allowed Dr. Smith to testify that he had worked extensively with Mother on the concerns raised in Dr. Santoro's report and that, in his view, she had responded well to treatment. By allowing Dr. Smith to provide non-expert

testimony concerning counseling and mental health treatment provided to Mother, while simultaneously recognizing the importance of Mother's constitutional rights, the court fulfilled its obligations under *A.A. v. Ab.D.* We perceive no abuse of discretion.

III. *Child Support*

Mother argues that the court improperly imputed full-time income to her because it failed to make an appropriate voluntary impoverishment finding. Father responds that the court did, in fact, make a voluntary impoverishment finding, although it did not do so expressly. We hold that, under the specific facts of this case, any error the court may have made in this respect was harmless. We explain.

The calculation of child support is governed by Md. Code (1989, 2019 Repl. Vol., 2020 Supp.), § 12-204 of the Family Law Article ("FL"). Generally, a court must determine child support based on the guidelines set forth in FL § 12-204(e), using the parties' combined adjusted actual income. A court may impute potential income to a party only if it finds that the party is voluntarily impoverished. FL § 12-204(b) ("[I]f a parent is voluntarily impoverished, child support may be calculated based on a determination of potential income."). The factors relevant to voluntary impoverishment and potential income overlap significantly. A court must consider several factors before making a voluntary impoverishment finding:

> 1. [the party's] current physical condition;
>
> 2. [the party's] respective level of education;
>
> 3. the timing of any change in employment or financial circumstances relative to the divorce proceedings;

4. the relationship of the parties prior to the divorce proceedings;

5. [the party's] efforts to find and retain employment;

6. [the party's] efforts to secure retraining if that is needed;

7. whether [the party] has ever withheld support;

8. [the party's] past work history;

9. the area in which the parties live and the status of the job market there; and

10. any other considerations presented by either party.

Durkee v. Durkee, 144 Md. App. 161, 183–84 (2002) (quoting *Goldberger v. Goldberger*, 96 Md. App. 313, 327 (1993)). After determining voluntary impoverishment, the court may then calculate the potential income to impute to that party. In making that determination, the court must consider the following factors:

1. age

2. mental and physical condition

3. assets

4. educational background, special training or skills

5. prior earnings

6. efforts to find and retain employment

7. the status of the job market in the area where the parent lives

8. actual income from any source

9. any other factor bearing on the parent's ability to obtain funds for child support.

Id. at 184–85 (citing *Goldberger*, 96 Md. App. at 328).

Important to this case is the level of discretion afforded to the court in fashioning a child support award. Because of Father's substantial income ($37,548 per month), this is an "above Guidelines" case. FL § 12-204(d) allows for the court to exercise its discretion in determining the amount of a child support award when the parties' combined income exceeds the highest amount listed in the Guidelines, *i.e.*, $15,000 per month.[9] The court's discretion is limited in two ways: First, the award may not generally be lower than the highest amount provided in the Guidelines. *Voishan v. Palma*, 327 Md. 318, 331–32 (1992). Second, the award must still comport with the policy behind the Guidelines—that the child should "enjoy the same standard of living[] he or she would have experienced had the child's parents remained together." *Jackson v. Proctor*, 145 Md. App. 76, 92 (2002) (quoting *Allred v. Allred*, 130 Md. App. 13, 17 (2000)). A child is entitled to a standard of living that corresponds to the parents' income. *Id.* Aside from these restrictions, "the court may employ any rational method [of calculation] that promotes the general objectives of the child support Guidelines and considers the particular facts of the case before it." *Kaplan v. Kaplan*, 248 Md. App. 358, 387 (2020) (quoting *Malin v. Mininberg*, 153 Md. App. 358, 410 (2003)).

In this case, it is uncontroverted that Father earns $37,548 per month. Although Mother was only working part-time, the court found that she had the ability to secure full-

[9] We recognize that, effective July 1, 2022, the child support guidelines will increase to a combined adjusted actual income of $30,000 per month. *See* 2020 Md. Laws Ch. 384 (S.B. 847).

time employment. To justify imputing income to Mother, the court made the following findings:

> With regard to [Mother]'s income, the [c]ourt notes that the minor child turned two years old on November 12, 2020. Therefore, the [c]ourt finds that [Mother] should be working full time for purposes of the child support guidelines. Her physical condition is such that she is able to work full-time. She has a college degree and has worked in the same field, logistics, most of her career. Her decision to work part time, while it may be based on the needs of her children, does not, in and of itself, relieve her of the duty of fully contributing financially to the well-being of [the child]. Furthermore, while [Mother] has three other children, said children are not [Father]'s children. Also, no retraining is necessary, given that she is in the same field that she's been in for most of her career. Her past work history is also significant due to the fact that at one point she did work full-time prior to having her three older children.

The court then used Mother's hourly rate of $31.73 per hour for her part-time employment to calculate her income based on a forty-hour work week, finding that her imputed income as a result of full-time employment would be $5,499 per month. The court then added Mother's dividend income of $290 per month to find her "total monthly income of $5,789.00." The court consequently found that Father earned 86.6% of the combined income while Mother earned 13.4%.

Mother asserts that the court erred in its voluntary impoverishment finding because "[n]o evidence was introduced to suggest that [Mother] has made a conscious decision to render herself impoverished," and the court "did not make a finding that full time employment was available to her at her current job and it did not take into consideration how her working full time would impact her expenses including day care for a two (2) year old."

We need not decide whether the court's voluntary impoverishment findings were sufficient because the court's child support award was ultimately not based on Mother's potential income. Using the 86.6% of combined income for Father and 13.4% for Mother, the court determined the presumptive minimum amount of child support pursuant to *Voishan* to be $1,371 per month.[10] Using the same percentages for combined monthly income of $43,337 ($37,548 for Father and $5,789 for Mother), the court looked to the SASI-CALC extrapolation method,[11] which suggested that Father's child support obligation should be $4,032 per month. But the court expressly concluded that neither the presumptive minimum under the Guidelines nor the SASI-CALC extrapolation method to calculate child support was in the child's best interest. Instead, the court decided to ascertain the child's actual monthly needs based on Mother's financial statement. The court specifically reduced certain expenses listed on Mother's financial statement which it found to be excessive—Mother has not challenged those reductions on appeal (likely because those findings do not appear to be clearly erroneous). After making those adjustments, the court found that the "total amount of expenses for [Mother] and her four children" amounted to $10,959 per month. The court then divided $10,959 by five (thus

[10] It is not clear to us why the court used the Guidelines table for combined monthly income of $14,850 rather than $15,000, the highest monthly income listed in the current Guidelines.

[11] SASI-CALC is a software program used to calculate child support. When calculating child support above the guidelines, the program determines the "percentages of child support applied to the highest level of income covered by the statute and applie[s] this percentage to the income in excess of $10,000.00." *Frequently Asked Questions*, SASI-CALC, https://www.sasi-calc.com/faqs.php (last visited Sept. 9, 2021).

eliminating expenses attributable to Mother and her three other children) to conclude that the child's needs were $2,191.80 per month. The court then used 86.6% representing Father's share of the combined income to determine that Father owed $1,900 per month in child support based on the "child's needs" methodology.[12] We note that if the court had not imputed additional income to Mother, Father's obligation under this methodology would have been $2,095.36 per month.

Despite finding that the child's needs were $2,191.80 per month of which Father would be obligated to pay $1,900 as child support based on Mother's imputed income, the court settled on a significantly higher child support amount:

> Given that [Father] is requesting that the [c]ourt continue to award child support to [Mother] in the amount of $3,000.00 per month, the Court finds that it is in the best interest of the minor child that [Father] pay [Mother] $3,000.00 per month in child support going forward. It should be further noted that the *Pendente Lite* amount of child support was also $3,000.00 per month and [Father] was current with the payments to [Mother]. The [c]ourt finds there are no arrearages. Therefore, the [c]ourt awards child support by [Father] to [Mother] of $3,000.00 per month.

Thus, even though the court found that the child's total monthly needs equaled $2,191.80, it required Father to pay Mother approximately $800 in excess of the child's *total* monthly needs while residing in Mother's household.[13] Moreover, the $3,000 per

[12] $2,191.80 x 86.6% is actually $1,898.10 per month. The court obviously rounded up to $1,900.

[13] Because the parties were awarded shared physical custody and Mother was not required to pay any support to Father, Father was also obligated to pay for all of the child's expenses as a result of living in Father's household.

month child support award far exceeds the $2,095.36 monthly child support that Father would have been obligated to pay if the court used Mother's actual part-time income rather than her imputed full-time income. As Mother has not challenged the court's methodology to determine child support based on the child's actual needs,[14] and the court has ordered Father to pay a sum substantially in excess of 100% of the child's monthly needs in Mother's household, we fail to see how any error in the court's analysis of voluntary impoverishment and assessment of potential income could be prejudicial. Pursuant to our caselaw's directive, the court employed a "rational method that promotes the general objectives of the child support Guidelines and considers the particular facts of the case[.]" *Kaplan*, 248 Md. App. at 387 (quoting *Malin*, 153 Md. App. at 410). We therefore affirm the court's determination requiring Father to pay $3,000 per month in child support.

JUDGMENT OF THE CIRCUIT COURT FOR ANNE ARUNDEL COUNTY AFFIRMED. COSTS TO BE PAID BY APPELLANT.

[14] Two prior cases have upheld awards calculated based on the child's needs rather than an extrapolation of the child support Guidelines: *Frankel v. Frankel*, 165 Md. App. 553, 577–78, 587 (2005), and *Voishan*, 327 Md. at 325–27.